IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 205

GLOBE LIQUOR COMPANY, INC., A CORPORATION,

Petitioner,

v.

FRANK SAN ROMAN and DOROTHEA SAN ROMAN, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF INTERNATIONAL INDUSTRIES,

Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

AUTHORITIES CITED

Cases:

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I.

The portion of the Todes deposition relied upon to establish that respondents were dealers was admitted into evidence.

In the trial court, after discovering that he had failed to offer in evidence the portions of the Todes deposition to which objections had not been sustained, respondents' counsel sought and obtained the consent of Globe's counsel and the order of the trial court that such portions of the deposition be "considered as introduced in the record." (R. 177-178). In the Circuit Court of Appeals, the respondents utilized certain of those portions of the deposition in their briefs and oral argument. Not only that, but after the Circuit Court of Appeals had held that "no part of the deposition was ever read or considered as read in evidence", respondents requested the Circuit Court of Appeals to

modify that conclusion and to hold that the portions of the Todes deposition upon which *they* relied had properly been admitted into evidence. (R. 262-264, 266). In their brief in opposition to the petition for certiorari, respondents stated that "for the purpose of considering this Petition for *Certiorari*, it may be considered that those portions of the deposition of Todes contained at pages 17 and 18 of petitioner's Petition were introduced in evidence." (at 25).

Respondents' counsel now asks this Court to hold that the express agreement between counsel, and the express ruling of the trial court, sought and obtained by respondents' counsel to cure his oversight, were ineffective to make that evidence a part of the record. (Resp. Br. 15-20). We confess to a feeling of outrage and shock that any attorney should repudiate and seek to have overthrown an agreement and order so obtained.

In general terms, the most obvious considerations of public policy operate to sustain agreements between counsel and orders entered thereon aimed at remedying oversights in the course of litigation. Everything was done, by both counsel and by the court, that could have been done to insure that Mr. Kahn's oversight in failing to make the necessary offer would not injure his clients on appeal. We cannot believe that it was beyond the power of the parties, with the approval of the trial court, to take such action, but that is what respondents now claim.

More specifically, whether or not the trial court's order was erroneous is not and cannot be before this Court. Having been induced by respondents' counsel and predicated upon an agreement between both counsel, the order was of course made without objection. It is fundamental that in such circumstances the court's ruling is not open to attack upon appeal. The only question open either in the Circuit

Court of Appeals or this Court with respect to the trial court's order is its scope. This question has been thoroughly discussed in our principal brief. (Pet. Br. 12-15). Without repeating the discussion here, suffice it to say that the record makes clear that the testimony upon which Globe relies to establish that the respondents were dealers within the meaning of Section 15(2) of the Illinois Uniform Sales Act was included within the scope of the trial court's ruling and hence was duly admitted into evidence.

II.

The respondents' contentions that there is no implied warranty are without merit.

As was pointed out in our principal brief (Pet. Br. 16-21), there are but two elements necessary to establish an implied warranty of merchantable quality: the sale must be by description and the sellers must be dealers in goods of that description. Ill. Rev. Stats. (1947) c. 121½, §15(2). Both of these two elements are established by the record evidence. Many of the respondents' contentions were anticipated and considered in our principal brief. There are, however, certain additional comments that should be made.

A.

Even if the complaint be construed as alleging an express warranty of merchantability, it is unsound to say that an implied warranty of merchantable quality may not be established in lieu thereof. (Resp. Br. 40-41). It is unnecessary to consider the well-known rule of the law of sales that where express and implied warranties are inconsistent, the implied warranty is negatived. Regardless of the scope of that rule, it should plainly not be invoked unless an express warranty exists. Globe did not rely upon nor introduce evidence with respect to the existence of an

express warranty. The Circuit Court of Appeals expressly held that there was no express warranty (R. 231) and respondents assert the same thing. There having been no express warranty, there can be no inconsistency between it and the implied warranty of merchantability upon which recovery is sought. Ill. Rev. Stats. (1947) c. 121½, §15(6). Moreover, this contention of respondents ignores Rule 15(b) of the Federal Rules, which permits amendment of the pleadings to conform to the evidence.

B.

Respondents state that the petitioner did not rely on the skill, choice or selection of the goods by the respondents, and that, hence, there could not have been any implied warranty with respect to this transaction. (Resp. Br. 42). The applicable rule of decision is other than that stated by respondents. The express language of the Illinois Uniform Sales Act makes clear that reliance upon the seller's skill or judgment is relevant only in raising an implied warranty of fitness for a special purpose under Section 15(1) and has nothing to do with the implied warranty of merchantable quality established by Section 15(2) of that Act. Ill. Rev. Stats. (1947) c. 121½, §15.

C.

Respondents contend that since they were agents they could not be dealers within the meaning of Section 15(2) of the Illinois Uniform Sales Act. (Resp. Br. 46-47). This contention is unsupported by any pertinent authority. Assuming *arguendo* that respondents were agents, the two decisions which they cite involve state Securities Acts which by statutory definition excluded salesmen or agents from the term "dealers". Moreover, the record evidence in this case establishes that the respondents were prin-

cipals in the transaction, or, at the very least, agents of an unidentified shipper and hence responsible as principals upon their contract. *Infra* pp. 10-11.

D.

There is no merit in the contention of the respondents that an implied warranty of merchantable quality is not raised in sales between dealers. *Annotation,* 64 A. L. R. 883, 884, (1929). And in a case involving similar facts between a different plaintiff and these respondents and tried before a different judge without a jury, the District Court for the Northern District of Illinois in entering judgment against these respondents so held. *Alex J Mandl, Inc.* v. *San Roman,* (N. D. Ill. E. D. Dkt. No. 45C121, memo. op., LaBuy, J., dated September 17, 1947, unreported). In that opinion the District Court said:

> "Having before it only one reported [Illinois] case involving dealer transactions, but having also considered the apt expression of theory of both the Illinois, New York, and other cases, this court feels that the warranty imposed by Section 15(2) of the Illinois Uniform Sales Act extends to dealings between dealers."

E.

Both in their brief (Resp. Br. 40) and in their Objections to Motion of Petitioner for Transfer of Case to Regular Docket (p. 3), filed on December 12, 1947, respondents pervert the statement of the Circuit Court of Appeals that amendment of the complaint pursuant to Rule 15(b) was not requested until after oral argument into a statement that the existence of an implied warranty had never been asserted by petitioner prior to that time. What the Circuit Court of Appeals said is perfectly clear from a reading of its Opinion on Rehearing and it is unnecessary to do more

than bring counsel's misstatement to the attention of this Court. (R. 257-258). As we have pointed out elsewhere, the entire case was tried on the assumption that a warranty existed and that the only issues were whether the respondents had acted as agents of a disclosed principal in Mexico or whether they had been orally exonerated from liability as agents. (Pet. Br. 4). In their brief in the Circuit Court of Appeals, respondents dealt at length with the issue of implied warranty. At the oral argument, the question of whether or not an implied warranty existed was the subject of considerable discussion.

It is perfectly true, as the Circuit Court of Appeals said, that the suggestion that the complaint be treated as amended pursuant to Rule 15(b) to conform to the evidence of the implied warranty was not made until after oral argument and before the court rendered its opinion. Until the oral argument, when the court clearly showed a disposition to regard the complaint as alleging an express warranty, we had never regarded such an interpretation as a probable one. We still feel that it was unduly harsh and technical and contrary to the provisions of Rule 8(f) of the Federal Rules that pleadings "shall be so construed as to do substantial justice".

The Circuit Court of Appeals patently did not regard as untimely the request that the pleadings be amended to conform to the evidence of an implied warranty. It conceded that amendment would be appropriate if the evidence established such a warranty. The circuit courts of appeals regularly and properly follow the practice of liberally construing Rule 15(b) to authorize amendments to conform to the evidence. This is done even where the evidence is not complete as here but is sufficient to show the existence of a *bona fide* cause of action.

For the proper practice, see *Wall* v. *Brim*, 138 F. (2d) 478, 481 (C. C. A. 5th, 1943); *Wall* v. *Brim*, 145 F. (2d) 492, 493 (C. C. A. 5th, 1944), *cert. den.* 324 U. S. 857; *Venuto* v. *Robinson*, 118 F. (2d) 679, 683 (C. C. A. 3rd, 1941); *Cabel* v. *United States*, 113 F. (2d) 998, 1000 (C. C. A. 1st, 1940); *American Fork & Hoe Co.* v. *Stampit Corporation*, 125 F. (2d) 472, 474 (C. C. A. 6th, 1942); *Lientz* v. *Wheeler*, 113 F. (2d) 767, 769 (C. C. A. 8th, 1940).

III.

Under Illinois law, the agent of an unidentified principal is liable as principal upon his contracts.

Respondents offered evidence to show that they had communicated the name of their alleged principal to Globe. The evidence showed on its face that the communication had taken place after Globe had become firmly bound to purchase the merchandise. We showed in our principal brief that this evidence was properly excluded by the District Court since under Illinois law the agent of an unidentified principal is liable as principal upon his contracts and a disclosure of the identity of his principal subsequent to the third person's becoming bound comes too late to relieve the agent of liability. (Pet. Br. 24-28).

The respondents assert *first*, that the mere disclosure of an agency status even without identification of the principal will relieve the agent of liability in the absence of an express agreement to be bound (Resp. Br. 61-67) and *second*, that the disclosure of the identity of the respondents' alleged principal had been made in apt time. (Resp. Br. 56-61). These points will be briefly considered.

A.

In our principal brief we relied upon *Annes* v. *Carolan, Graham, Hoffman, Inc.*, 336 Ill. 542 (1929) to show that in Illinois the agent of a partially disclosed principal, that

is, an agent whose agency status had been disclosed but whose principal remained unidentified, was liable as principal upon his contracts. The respondents seek to distinguish this case upon the ground that it is a case of a so-called "non-existent" principal. (Resp. Br. 62). The distinction is plainly unsound in view of the court's statements that "the question is whether under this undisputed evidence the principals whom defendant in error represented were wholly or partially undisclosed" and "defendant in error acted as the agent of the underwriters, namely, Morgan, Lyons & Co., who were members of Lloyd's at London." 336 Ill. at 546.

Respondents point to *Chicago Title and Trust Co.* v. *DeLasaux,* 336 Ill. 522 (1929), decided on the same day as the *Annes* case *supra,* as a contrary authority. The opinion in the *DeLasaux* case clearly states that *both* the fact of agency and the identity of the principal were fully disclosed to the third party with whom the agent had dealt. 336 Ill. at 526. After making this abundantly clear, the court again stated that "there was no question of an undisclosed principal." *Id.* This sentence immediately precedes the partial excerpt quoted by respondents at page 63 of their brief to show the contrary.

Similarly, in each of the other cases cited by respondents in support of their contention (Resp. Br. 63-66), both the fact of agency and the identity of the principal were fully disclosed to the third party or known by him. That is not the present case. Here we are concerned with a partially disclosed or unidentified principal. The *Annes* case, *supra* as well as the other Illinois decisions and general texts cited by the petitioner in its principal brief, represent the well-established law of the state of Illinois and are decisive. (Pet. Br. 24-28.)

B.

In asserting that the disclosure of the identity of their alleged principal on May 10, 1944, was timely, respondents are driven to asserting not only that there was no agreement at all between the parties but that the irrevocable letter of credit became irrevocable only when acted upon by drawing a draft thereunder. (Resp. Br. 56-61.)

Under the written agreement between the parties, Globe was firmly bound. That agreement consisted of its order or offer, a counter-offer by Todes, respondents' agent, and the acceptance by Globe, all of which incorporated by reference the terms of the letter of credit. (Pl. Exs. 1-4; R. 178-181, 63-67.)

What the respondents assert is that the disclosure to Globe of the identity of their alleged principal six weeks after the exchange of letters and the delivery of the irrevocable letter of credit to them as beneficiaries relieved them from liability. Their theory is that at that time had Globe been dissatisfied with the principal it could have withdrawn from the transaction. This can only be characterized as an argument made in complete disregard of the written word.

It is true that at the time the identity of respondents' alleged principal was communicated to Globe, no drafts had yet been drawn against the irrevocable letter of credit, but it is equally true that the letter of credit expressly named the respondents as beneficiaries, was expressly designated as irrevocable and expressly authorized assignment by the respondents. The Chase National Bank was firmly bound under that letter of credit to pay any drafts that might be presented in accordance with its terms, and Globe was firmly bound to reimburse the Chase National Bank. Neither Chase nor Globe could have recalled the

letter of credit, except for fraud. (Pl. Ex. 4; R. 181, 67.) Nor could Globe have refused to accept delivery of the merchandise under its agreement. Even assuming the respondents to have been agents, the disclosure came too late to relieve them of liability. (Pet. Br. 24-25.)

IV.

There is no evidence or offer of proof that respondents were in fact agents of the Mexican shipper.

Repeatedly in their brief, respondents assert that they were agents and that the petitioner admitted them to be agents. The fact is that the complaint alleged them to be principals and that the record discloses them to be principals. Petitioner has merely stated that since they had failed to make a timely identification of their alleged principal, it is of no importance whether they are principals, or agents of an unidentified principal.

Respondents' amended answer raised as an affirmative defense that they were the agents of Gonzalo A. Larrea, the Mexican shipper. (R. 12, 14, 15). Agency is a fact to be proved like anything else. It is established by written or oral agreement between the principal and his agent. Statements by respondents' salesman to Globe that the respondents were agents, even if made, are without probative value in establishing that the respondents were the agents of another. At no time in the course of the entire trial did the respondents make an offer of proof of an agency agreement, either written or oral. None was offered as an exhibit and the detailed offer of proof as to what the testimony of San Roman would have been if he had been permitted to testify is loudly silent as to the creation of an agency relationship between him and the Mexican shipper or anyone else. (R. 165-166).

Respondents' counsel apparently assumes that agency is established by a showing that the tequila was shipped from Mexico to its ultimate destination. It was of course known that the tequila came from Mexico. That is of no significance in ascertaining whether respondents were principals or agents. They could have sold as principals either merchandise which they owned in Mexico, or merchandise which they did not own but expected to acquire after they had Globe's agreement to purchase, supported by an irrevocable letter of credit.

We continue to assert that it is a matter of indifference under Illinois law whether the respondents sold the tequila as principals or as the agents of an unidentified principal, but the fact is that not only have the respondents wholly failed to make any offer of proof showing them to be agents, but the entire correspondence between Globe and the respondents or their salesman, as well as their insistence upon delivery of an irrevocable letter of credit naming them and no other as beneficiaries (R. 98), makes clear that they were the principals in fact.

V.

Respondents introduced no evidence to show that mitigation of damages was feasible.

Respondents assert that Globe was under a duty to accept the direction of the Mexican shipper to recondition the merchandise at the Mexican shipper's expense. (Resp. Br. 50). This so-called offer was contained in Defendants Exhibit 11 for identification which was properly excluded by the trial court. (R. 199, 172). There was no duty upon Globe to act upon the instructions of a person in Mexico whom it did not know and with whom it had had no relationship.

But regardless of this, it is established that the burden was upon the respondents to show that the damages could

have been mitigated through the exercise of reasonable means. *Paramount Pictures Distributing Corporation* v. *Gehring*, 283 Ill. App. 581 (1936); *Standard Growers Exchange* v. *Hooks*, 22 F. (2d) 599, 600 (C.C.A. 5th, 1926); *Annotation*, 134 A. L. R. 242 (1941). The respondents offered no evidence to show what the cost of filtering and rebottling the merchandise would have been or that such an undertaking was feasible either in the sense that it was technically possible or that there were rectifiers available to do it.

VI.

The Circuit Court of Appeals was without power to remand with directions to grant International's motion for a directed verdict and to enter judgment thereon.

In our principal brief we made clear that because of the failure of the respondents to make a motion for judgment in accordance with their motion for a directed verdict pursuant to Rule 50(b) of the Federal Rules, the Circuit Court of Appeals was without power to terminate the litigation by directing the District Court to grant respondents' motion for a directed verdict and enter judgment thereon. Among other things, this Court's decision in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947) was relied upon. That argument will not be repeated here. (Pet. Br. 28-42.)

Two of respondents' points require brief consideration. Respondents assert that their motion for a new trial was equivalent to a motion for judgment in accordance with their motion for a directed verdict within the meaning of Rule 50(b). (Resp. Br. 10-15). The Federal Rules of Civil Procedure, of course, draw a sharp distinction between the post verdict motion for judgment authorized by Rule 50(b) and the motion for a new trial authorized by Rule 59. Indeed, Rule 50(b) recognizes the separate character of the

motions by authorizing them to be joined or requested in the alternative. And this Court in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243 (1940), pointed out that "each motion, as the rule recognizes, has its own office." (at 251)

Wholly apart from this novel view of the function of a motion for a new trial, respondents' argument is absurd on its face. The discretion exercised by a trial court in considering whether a losing *defendant's* motion for a new trial should be granted is wholly unlike the discretion protected by the *Cone* case and exercised by a trial court in considering whether a new trial should be ordered for a *plaintiff* after becoming convinced that it had erred in denying the defendant's motion for a directed verdict.

Respondents also assert, as did the Circuit Court of Appeals, that only questions of law are involved and that, hence, the *Cone* case is without application (Resp. Br. 33-37). Both the Circuit Court of Appeals and the respondents misread the *Cone* case. In that case this Court assumed that the Circuit Court of Appeals was correct in determining that there were no questions of fact for the jury and that only questions of law were present, but held, nevertheless, that the Circuit Court of Appeals was without power to direct the entry of final judgment in the absence of an appropriate post-verdict motion under Rule 50(b). 330 U. S. at 250. Thus, there is no distinction between the *Cone* case in the posture in which it was considered by this Court, and this case as viewed by the Circuit Court of Appeals and the respondents.

Throughout their brief, respondents repeated time and again that only questions of law are involved. As we have pointed out, even if true, this would not permit the Circuit

Court of Appeals to terminate the litigation in view of the procedural status of this case. The petitioner believes that the District Court was correct in instructing a verdict, and that no questions of fact are presented as to the existence of the essential elements of respondents' liability to the petitioner. But it certainly does not follow that if the petitioner be wrong in this respect, that a verdict must be directed for the respondents. Rebuttal evidence in the possession of petitioner was never offered since the exclusion of so much of the Todes deposition and the respondents' exhibits made it unnecessary to do so.

If the petitioner should be wrong in its conclusion that the trial court properly directed a verdict, then it is for the trier of the facts to determine the contested issues.

VII.

It was error to direct the District Court to grant respondents' motion for a directed verdict upon grounds not specified in that motion.

Although conceding that the District Court's judgment was reversed upon grounds not specified in their motion for a directed verdict, the respondents urge that that motion should be read in the light of their having brought these grounds to the attention of the trial court at earlier stages of the proceedings. It is unnecessary to consider whether a motion for an instructed verdict should be so read since at no time were the grounds upon which the Circuit Court of Appeals disposed of this case ever brought to the attention of the trial court. Each of respondents' record citations may be examined in vain for any contention on the part of the respondents before the trial court that Globe had alleged and failed to prove an express warranty

(the ground upon which the Circuit Court of Appeals rested its reversal and direction that judgment be entered), or that there was a failure of proof on the part of Globe of an essential element of an implied warranty (the ground upon which the Circuit Court of Appeals denied the petition for rehearing).

As we read respondents' brief, they do not even assert the contrary. They say at most that they had raised below the question of whether or not all warranties had been disclaimed. There is a substantial difference between asserting that an implied warranty has been disclaimed and asserting that the essentials creating an implied warranty do not exist. Ill. Rev. Stats. (1947) c. 121½, §§15(2), 71.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed. Even were this Court to conclude to the contrary, so much of the judgment of the Circuit Court of Appeals as directs the District Court to grant respondents' motion for a directed verdict and to enter judgment thereon should be reversed and these proceedings should be remanded to the Circuit Court of Appeals with instructions to remand to the District Court for a new trial.

Respectfully submitted.

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